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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1280

ALEXANDER J. BARKET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Alexander J. Barket, petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on December 9, 1975.

OPINIONS BELOW

The unreported memorandum opinion of the district court is reproduced in Appendix A, *infra*. The opinion of the Court of Appeals is not yet reported but is reprinted in Appendix B, *infra*.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed on December 9, 1975. Petitioner's timely petition for rehearing en banc was denied on February 9, 1976 (Appendix C, *infra*). This petition was filed within 30 days of February 9.

Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May petitioner, who has been acquitted of violating 18 U.S.C. § 656, now constitutionally be tried for consenting to an illegal political contribution under 18 U.S.C. § 610, based on the same evidence and the same transaction, even though the first-tried charge incorporated the allegations of the second charge and the trier of fact found in the first trial that petitioner did not act willfully and was not "tied" to the transaction, and that the purpose of his actions was not the making of an illegal political contribution?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

STATUTES INVOLVED

The relevant portions of the two substantive statutes involved in this case, 18 U.S.C. § 610 and 18 U.S.C. § 656, as they existed at the time of the underlying transaction, are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

On May 9, 1974, petitioner was indicted on two counts based upon a single alleged incident which had occurred on October 15, 1968. Count I of the indictment purported to allege that petitioner had consented to an illegal political contribution in violation of 18 U.S.C. § 610:

> "On or about the 15th day of October, 1968, in the Western District of Missouri, defendant Alexander J. Barket unlawfully, willfully and knowingly did consent to the contribution and expenditure of moneys belonging to the Civic Plaza National Bank in the amount of $7,500 in connection with the 1968 election at which presidential and vice presidential electors for the United States of America were to be voted for; all in violation of Title 18, United States Code, Section 610."

In a separate Count II, a violation of 18 U.S.C. § 656 was alleged to have arisen out of the very same incident:

> "On or about the 15th day of October, 1968, in the Western District of Missouri, defendant Alexander J. Barket, being an officer and director of the Civic Plaza National Bank, a national bank organized and existing under an act of Congress, with intent to injure and defraud said national bank, willfully and knowingly did misapply moneys and funds of such bank in the amount of $9,144.00 by paying said funds of the said bank to Rudolph E. Zatezalo under the guise of a bonus salary, which had not been earned and which had not been authorized by the Board of Directors of the said bank, *for the purpose of making an unlawful political contribution;* all in violation of Title 18, United States Code, Section 656."[1]

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[1] The $7,500 figure referred to in Count I represented the net proceeds to Zatezalo of the $9,144 bonus mentioned in Count II, after taxes and other payroll deductions. Emphasis has been supplied here and throughout this Petition except where otherwise indicated.

Petitioner filed a request for a bill of particulars, and in response thereto the government confirmed that the factual underpinnings of both counts of the indictment were identical:

> ". . . the government states that the offense charged against defendant in Count I of the indictment arises out of and is based on the same alleged acts and transactions of defendant and other facts which the government alleges constitutes the offenses charged in Count II."

Petitioner urged that the government should be required to elect between the two counts. The government then chose to proceed on Count II and, hence, to attempt to prove a violation of § 656. The trial court commented as follows:

> "The parties provided, and the Court approved their agreement that if there was an acquittal on the Section 656 count, that proceedings directed toward Count I would be by Motion to Dismiss based upon the obvious theory and principles articulated in *Nash v. Swenson* [*sic*]. I think it is fair to say that all counsel were in general agreement that an acquittal on Count II would, in all probability, as a matter of law, be a final disposition of Count I."

The case proceeded to trial on Count II before the trial judge, sitting without a jury. The government sought to prove that petitioner, the President of Civic Plaza, violated § 656 by willfully misapplying $7,500 of the funds of Civic Plaza by paying those funds to Rudolph Zatezalo for the purpose of making an unlawful political contribution proscribed by § 610. At that trial, the prosecutor left no doubt that the "unlawful political contribution" referred to in Count II of the indictment was the precise act which constituted the subject matter of Count I:

> "I believe and I hope that the Court understands what the government's theory is. That is the theory that *underlying unlawfulness* which is mentioned here [in Count II] that is, *the unlawful political contribution, was the unlawful consent given by the defendant Barket to the making by the corporation of the payment to the political—the ultimate political donee.*"

In response to petitioner's argument that the government was trying the wrong case, and that in effect it had produced evidence arguably supportable of a § 610 charge, counsel for the government unequivocally acknowledged that Count I had in fact been tried with, and subsumed by Count II:

> "In a sense, [petitioner's counsel] is correct, the plaintiff, the Government, would like to try Count I *and in effect tried it in this case* . . . [I]t is the Government's position that the defendant consented to the payment of the bank's funds, and I repeat the bank's funds, the bank's money to and for the benefit of a political donee in violation of Section 610 and that *very same act*, without doing more, he violated Section 656. . . ."

The prosecutor further told the trial court:

> "We have gone so far to say that once Count II is tried, in our opinion, we probably couldn't try Count I under the principles of *Ash versus Swinson* [*sic*] and other cases where collateral estoppel was raised. I may be wrong about that. But that is what I thought when I said it, and I think [prosecution co-counsel] Schneider thought that. *That is our position today.*"

On April 4, 1975, the district court rendered an oral opinion acquitting petitioner on Count II. Against the background of the prosecutor's repeated contentions that the "unlawful political contribution" forming the nucleus of Count II was the self-same donation alleged in Count I to be violative of § 610, and that the "underlying unlawfulness" was the petitioner's consent to that contribution, the trial court made the following express finding:

"It is my judgment, and I find, that there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an illegal political contribution."[2]

Another essential component of the government's case in Count II—as indeed it would be under Count I—was the establishment of a causal nexus between petitioner and the $7,500 payment. The court found such evidence wanting and entered the following finding:

"There is difficulty, however, in tying the $7,500 bonus *contribution* to either Dr. Zatezalo, *Barket*, Patti or anyone else . . ."

One other fundamental ingredient of a successful prosecution on both Counts is a showing of "willfulness" on the part of petitioner. Because of the invocation by a witness of his Fifth Amendment privilege against self-incrimination, the court held that there was insufficient proof of willfulness on petitioner's part. Referring to evidence which the witness *might* have been able to give, the court stated:

"Perhaps with that testimony, there may have been adduced some sort of evidence upon which to make a finding supported by factual data, as distinguished from conjecture and speculation, that the defendant acted willfully."

Following his acquittal on Count II, petitioner filed a motion to dismiss Count I based, *inter alia*, on the double jeopardy provisions of the Fifth Amendment. For the purpose of the double jeopardy issue, the government twice stipulated that the evidence which would be adduced by it at a trial of Count I

[2] The government's brief in the Court of Appeals acknowledged that the trial court, by this finding, concluded that petitioner "did not consent to the making of an *illegal* political contribution" (Emphasis in original).

would be *precisely*, in all respects, *the same evidence* previously offered in connection with its unsuccessful effort to obtain a conviction on Count II. The trial court denied petitioner's motion to dismiss, and petitioner filed a notice of appeal and an alternative petition for a writ of mandamus in the Court of Appeals.

Following full briefing and argument, the Eighth Circuit held (a) that the order was appealable (one judge dissenting) and therefore that the petition for mandamus was moot and (b) that the trial of petitioner on Count I would not be violative of the principles of double jeopardy or collateral estoppel. Both parties petitioned for rehearing. Petitioner's request was denied on February 9, 1976, and the government's petition (challenging the jurisdictional holding) was denied on February 13.

REASONS WHY THE WRIT SHOULD BE GRANTED

At the trial of petitioner on Count II, the government attempted to prove that he willfully misapplied the funds of Civic Plaza in violation of § 656 by causing them to be paid to a third person for the purpose of making an unlawful political contribution prohibited by § 610. In the still-pending Count I, petitioner is charged with willfully consenting to the contribution of the same funds belonging to Civic Plaza, in violation of § 610. It is acknowledged that the same incident, the same funds and the same "contribution" formed the nucleus of both counts, and the government has expressly stipulated that it will use precisely the same evidence at retrial that it presented the first time. We submit that this establishes a double jeopardy violation under the rationale of *Morgan v. Devine*, 237 U.S. 632, 641 (1915), where it was held that "the test of identity of offenses is whether the same evidence is required to sustain them." See also *Sealfon v. United States*, 332 U.S. 575 (1948); *In re Neilsen*, 131 U.S. 176 (1889).

But it is not necessary to dwell at length on the oft-times thorny issue of double jeopardy, for the instant case presents a classic example of collateral estoppel, and the Court of Appeals' holding stands in flagrant disregard of *Ashe v. Swenson*, 397 U.S. 436 (1970) and is even more squarely defiant of *Turner v. Arkansas*, 407 U.S. 366 (1972).

The question presented in *Ashe* (which, ironically, originated before the same district judge) was whether the defendant could be constitutionally tried for the robbery of a second poker player after he had been acquitted of robbing the first. The jury in the first trial had returned a general verdict of not guilty, and upon examination of the record, this Court concluded that the jury *must* have found that the defendant was not present at the scene of the crime. That fact, having been once resolved in defendant's favor, could not be relitigated by the government in

the second trial. The prosecution was collaterally estopped from even *attempting* to prove the essential fact of defendant's presence at the scene, and hence a second trial was forbidden by the double jeopardy clause. The nub of the Court's holding was as follows, *l.c.* 443:

> " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

The Court, *l.c.* 444, cautioned that:

> "The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."

The decisive nature of *Ashe* becomes apparent from an analysis of the record of petitioner's first trial and, particularly, from an examination of the government's theory as espoused by the prosecutor in his closing argument. He stated in no uncertain terms that the government "in effect tried [Count I] in this case" and acknowledged that an acquittal on Count II would foreclose further prosecution under Count I. The evidence adduced in the first trial focused on the payment of $7,500 to a political campaign. The government identified this donation as the "unlawful political contribution" referred to in Count I and contended that payment was a "violation of §610 and that that very same act, without doing more, violated § 656."[3]

---

[3] The government's brief in the Court of Appeals again acknowledged that "the trial of Count II necessarily involved proof of the allegations of Count I."

Because of the trial court's detailed findings of fact, it is beyond dispute on the present record (a) that the government in the first trial *attempted* to prove that petitioner *willfully* participated in the making of an illegal $7,500 political contribution and (b) that it *failed* to prove (1) that petitioner's action was willful, or (2) that it was taken for the purpose of making such a contribution, or (3) that petitioner was personally involved in the making of the contribution.[4] These are the identical indispensable elements of the §610 case which the government now wants another chance to prove. The Fifth Amendment simply will not permit relitigation of these issues, even if the government were prepared to offer fresh new evidence at the second trial, as was the case in *Ashe*.

The constitutional barrier has been made even more impenetrable by the government's stipulation that the evidence which it will offer at the second trial will be *identical* in all respects with that previously adduced with respect to Count II. That stipulation brings this case squarely within the facts of *Turner v. Arkansas*, 407 U.S. 366 (1972), which, we submit, requires summary reversal. There, as here, it was stipulated that in the defendant's second trial (for robbery), the very same evidence would be used as was adduced in his first trial (for felony-murder in the course of robbery). The defendant had been acquitted in the first trial. Because of this stipulation and the prior acquittal, this Court *summarily* reversed the lower court decision

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[4] The Court of Appeals distorted and rewrote the district court's findings so as to strip them of their obvious import. It ignored the incontrovertible fact that the prosecution's fundamental theory in this entire prosecution was "that underlying unlawfulness which is mentioned [in Count II], that is, the unlawful political contribution, was the unlawful consent given by the defendant Barket to the making by the corporation of the payment to the political—the ultimate political donee" (pp. 4-5, *supra*). The panel further disregarded the government's express concession in its appellate brief that the trial court, by this finding, found that petitioner "did not consent to the making of an *illegal* political contribution" (emphasis in original). The "illegality" referred to by the government and the trial court was under § 610, *not* § 656, as held by the Court of Appeals.

authorizing a second trial, holding that the case was "squarely controlled by *Ashe v. Swenson*." See also *Harris v. Washington*, 404 U.S. 55 (1971); *Simpson v. Florida*, 403 U.S. 384 (1971).

The Court below, in rejecting petitioner's double jeopardy plea, erroneously and abstractly focused upon the distinction between the statutory elements of §610 and §656 and ignored the fact that the government has in effect merged the two statutes in this case. This was clear error of constitutional dimensions, for the focus should be on *what* the government sought to prove, not under what statute it was proceeding. In *McDonald v. Wainwright*, 493 F. 2d 204, 207 (5th Cir. 1974), the Court said:

> "Having failed to prove certain illegal acts once, [the government] cannot be permitted to prove them again simply by changing the name of the crime."

In *United States v. United States Gypsum Co.*, 404 F. Supp. 619 (D.D.C. Dec. 10, 1975), the court rejected the precise approach employed by the panel below and applied the "same evidence" test of *Ashe*, *l.c.* 622:

> "Contrary to the Government's submission, this Court is persuaded that the proper application of the 'same evidence' test focuses not merely on a comparison of the statutory elements of these two offenses, but on whether either trial will involve any significant categories of proof absent from the other . . . Both prosecutions will require proof of the same facts by means of the same evidence . . .
>
> "[T]his Court is persuaded that *a double jeopardy analysis which focuses on technical comparison of the elements of the two statutes rather than on the overwhelming similarities in the proof the Government intends to present at the [second] trial will result in serious injustice.*

> "The Constitutional protection against double jeopardy should not be undermined by an overly formal or technical application of the 'same evidence' test."

In this case, the Eighth Circuit's emphasis on the "technical comparison of the elements of the two statutes," unrelated to the actual charges, facts and evidence, if allowed to go unremedied, will result in precisely that "serious injustice" that the court warned against and that the Fifth Amendment was designed to prevent.

The government itself has acknowledged that "this is an important . . . case involving issues of law of great significance to the administration of criminal justice both within [the Eighth] Circuit and throughout the federal judicial system." The Court of Appeals' opinion has effectively nullified *Ashe v. Swenson*. If its judgment stands unreviewed, the government will be licensed to splinter one act into two or more criminal charges and to run an accused through the gauntlet again and again until a conviction is finally obtained. Such a procedure is constitutionally intolerable.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States District Court for the
Western District of Missouri
Western Division

United States of America, Plaintiff, vs. Alexander J. Barket, Defendant.		No. 74 CR 141-W-1

MEMORANDUM AND ORDER DENYING MOTIONS TO DISMISS COUNT I

I

Defendant's pending motions to dismiss are based on numerous grounds most recently stated in a four paragraph motion filed April 8, 1975 and in defendant's supplemental motions and suggestions filed April 25, 1975. Final briefs were submitted June 23, 1975. Many of the questions presented were the subject of briefs earlier filed. We have carefully considered all briefs filed by the parties and conclude that none of the grounds relied upon in any of defendant's motions are tenable and that all of defendant's pending motions to dismiss Count I should be denied.

In stating the reasons for our determination we shall first discuss the grounds alleged in each of the four paragraphs of defendant's April 8, 1975 motion and then the grounds alleged in defendant's April 25, 1975 filings.

II

Paragraph 1 of defendant's April 8, 1975 motion alleges two grounds for dismissal. The first ground alleges that Count I of the indictment should be dismissed on the ground that:

> The prosecution of Defendant upon Count I is barred by the Fifth Amendment's guarantee against double jeopardy because of the acquittal of Defendant upon Count II of the Indictment and the dismissal of the Information against Civic Plaza National Bank for the same alleged offense, as set forth in, *inter alia*, *Ashe v. Swenson*, 397 U.S. 436 (1970) . . .

Defendant argues in one of his recent briefs (April 25, 1975) that "reprosecution is barred both by the fact (a) that the two crimes charged in Counts I and II of the indictment are in reality the 'same offense' and (b) that, whether or not they may strictly be classified as the 'same offense,' the Court's disposition of Count II forecloses further proceedings under Count I by reason of the principle of collateral estoppel as articulated by the Supreme Court in *Ashe v. Swenson*."

The defendant, of course, would not be subjected to a "reprosecution" by the trial of Count I unless (a) the defendant's contention that Counts I and II are in reality the "same offense" is tenable, or unless (b) defendant's contention in regard to the applicability of collateral estoppel principles articulated in *Ashe v. Swenson, supra*, is tenable.[1]

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[1] In *United States v. Sabella* (2d Cir. 1959), 272 F. 2d 206, 211, cited by defendant, Judge Friendly commented on the difference between a case involving a subsequent or repeated indictment, and a case involving the trial of a single multiple count indictment. We quite agree with Judge Friendly's comment that "confusion has been created by the citation of successive indictment cases in opinions where the issue was only what charges could be joined in a multiple count indictment and *vice versa*. . . ."

Defendant in this multiple count indictment case relies for the most part on language quoted from successive indictment cases. Those cases fail to put in focus what Judge Friendly said in *Sabella* in regard to the historical and practical differences in the two categories of cases. See also footnote 14 in Mr. Justice Brennan's concurring opinion in *Ashe v. Swenson, supra*, on page 460 of 397 U.S., in which other distinctions are stated.

Other closely analogous questions are presented by the line of cases dealing with inconsistent verdicts in a multi-count indictment. Whether the rule of *Dunn v. United States*, 284 U.S. 390 (1932), permitting inconsistent jury verdicts is applicable to a trial before a judge is a question which has received contrary answers in the Circuits. Compare *McElheny v. United States* (9th Cir. 1944), 146 F. 2d 932 with *United States v. Maybury* (2nd Cir. 1960), 274 F. 2d 899. See also *United States v. King* (2nd Cir. 1967), 373 F. 2d 813, *cert. den.* 389 U.S. 881 (1967); *United States v. Rosengarten* (2d Cir. 1966), 357 F. 2d 263; *United States v. Wilson* (2d Cir. 1965), 342 F. 2d 43; *United States v. Sells* (2d Cir. 1960), 325 F. 2d 16; *United States v. Robinson* (2d Cir. 1963), 320 F. 2d 980; *United States v. Sambardi* (2d Cir. 1960), 276 F. 2d 169, *cert. den.* 364 U.S. 342 (1960), in which principles stated in *Maybury* were applied.

There can be no doubt that *Ashe* determined that the Double Jeopardy guarantee of the Fifth Amendment embodies collateral estoppel as a constitutional principle.[2] Defendant properly recognized that the procedural and factual circumstances presented in this case are not the same as those presented in *Ashe v. Swenson, supra*. See page 7 of defendant's April 25, 1975 brief. Defendant has also recognized that double jeopardy questions are more easily posed than answered. Ibid, p. 9.

Mr. Justice Stewart's opinion for the Court in *Ashe v. Swenson, supra*, stated the following test to be applied in double jeopardy cases:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach re-

[2] "Collateral estoppel" was defined as follows: " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

quires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579.[3]

Our memorandum and order of March 26, 1975 denying defendant's motion to dismiss Count II reflects our careful examination of the government's Section 656 allegations. We noted that in its second and pending indictment the government had changed the language of its original dismissed indictment to include an allegation that the moneys were paid "for the purpose of making an *unlawful* political contribution." We rejected the defendant's argument that the quoted language be treated as surplusage, and therefore subject to being stricken, so that its elimination would leave an indictment which failed to add the necessary gloss to a Section 656 misapplication charged, as required by *United States v. Britton*, 107 U.S. 655 (1882).

Count II contained no reference whatsoever to Section 610 and no determination of any sort was made in connection with Count II which could be said to constitute a finding that the defendant may not have violated Section 610, as alleged in Count I. Such a question of fact or of law simply was not presented. The government's continued fascination with the notion, exemplified in its closing argument, that the defendant could simultaneously be found guilty of both Count I and Count II does not support the conclusion that Count I must be dismissed

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[3] The broader test suggested in Mr. Justice Brennan's concurring opinion has not received the approval of a majority of the Supreme Court or of our Court of Appeals. The broader test suggested may not properly be applied by this Court. See *Moton v. Swenson* (8th Cir. 1973), 488 F. 2d 1060.

for the reason the government did not obtain a conviction in regard to Count II.

In connection with the Section 656 charge contained in Count II of the indictment, the government was obligated to establish beyond reasonable doubt that the defendant, with intent to injure and defraud the bank of which he was an officer and director, willfully and knowingly misapplied $9,144.00 for the purpose of making an unlawful political contribution. The Section 610 charge alleged in Count I does not require proof of any factual data essential to a Section 656 conviction under Count II. The charge in Count I requires that the government prove beyond reasonable doubt that the defendant "consented" to a $7,500 contribution made by the bank in violation of Section 610. That is an entirely different charge than Count II which alleged that the defendant had made an unidentified unlawful political contribution with money which he had converted from funds formerly owned by the bank.

It is, of course, obvious that there are many factual circumstances which are relevant and material to each count. Indeed, much of the factual situation presented is virtually undisputed. But to say that is not to say that questions of fact essential to a conviction in connection with the Section 610 charge contained in Count I were in fact litigated and conclusively determined in defendant's favor in connection with the trial of the Section 656 charge contained in Count II. Nor is it to say that, as a matter of law, a verdict of not guilty in regard to Count II commands a like verdict of not guilty in regard to Count I.

Our review of the entire record, in which we have taken into account the essential elements which the government must establish beyond reasonable doubt under each of the Counts of the two count indictment, and our familiarity with the grounds upon which Count II was determined, requires that we find and conclude that the determination of Count II was in fact and in law based on grounds which may consistently permit a finding of

guilty in regard to the Section 610 charge contained in Count I. In accordance with the mandate of *Ashe v. Swenson, supra,* we have conducted our inquiry in a practical frame with an eye toward all the circumstances of the proceedings. In short, we find the first ground stated in paragraph 1 of defendant's motion to dismiss, filed April 8, 1975, to be without merit.

III

The second ground alleged in paragraph 1 of defendant's April 8, 1975 motion to dismiss alleges that the prosecution of the defendant under Count I is barred for the reasons stated in defendant's motion:

> Memorandum and Reply Memorandum in Support of Motion to Dismiss Count I of the Indictment Because of the Dismissal of the Information Against Civic Plaza National Bank for the same alleged offense, as set forth in, *inter alia, Ashe v. Swenson,* 397 U.S. 436 (1970). . . .

The files and records of the Court show that initially, and on October 11, 1973, the government jointly indicted the Bank and the defendant in a single count, purporting to allege a Section 610 violation against both. On November 23, 1973, this Court granted the joint motion of the defendant and the Bank to dismiss the original indictment. The appeal noticed by the government to that order was subsequently dismissed on the government's motion. A second indictment containing Count I of the pending indictment was filed against the defendant on May 9, 1974.

On May 21, 1974, the government filed an information against the bank for an alleged violation of Section 610. For all practical purposes, the second indictment of defendant and the information against the Bank simply separated the charges initially made jointly against both in a single count of the

original indictment. On June 25, 1974 Judge Hunter granted the Bank's motion to dismiss the information on the ground that the statute of limitations had expired in that §3282, Title 18, U.S.C. was not broad enough to "save" the government's charge against the Bank because it elected to proceed by way of information rather than by indictment.

Defendant's argument that Judge Hunter's dismissal of the Section 610 information against the Bank somehow bars prosecution of the defendant under Count I is explicitly based upon the fundamental premise that a bank and its officers share a derivative liability relationship under Section 610 and that the liability of a corporate officer or director is therefore dependent upon the bank's conviction of making a political contribution prohibited by the statute. Defendant, on page 28 of its memorandum of July 19, 1974, argues that "[U]nder Section 610, the criminal liability of an officer or director of a corporation is dependent upon that of the corporation."

The same question was presented to Judge Richey in *United States v. Boyle* (D. D.C. 1972), 338 F. Supp. 1028. The labor organization of which defendant Boyle was an officer was not indicted. Judge Richey concluded that "the Court disagrees with the defendants' contention that the United Mine Workers of America should be indicted and convicted as a condition precedent to the indictment and conviction of its officers." Defendant Boyle's conviction was affirmed in *United States v. Boyle* (D.C. Cir. 1973), 482 F. 2d 755, *cert. den.* 414 U.S. 1076 (1973). Defendant's contention that the "issue of defendant's derivative liability, present in the instant case, was not raised in *Boyle*" (p. 4 of defendant's August 19, 1974 brief) is not tenable. We find and conclude that Section 610 establishes separate and independent offenses in regard to a bank and in regard to one of its officers or directors. Because the major premise upon which defendant's argument is based is untenable, we find and conclude that

the second ground stated in paragraph 1 of defendant's April 8, 1975 motion to dismiss is without merit.

IV

Paragraph 2 of defendant's April 3, 1975 motion to dismiss alleges that:

> Count I fails to state an offense against the United States, as set forth in Supplemental Memorandum in Support of Defendant's Motion to Dismiss Count I for Failure to State an Offense filed herein on July 19, 1974, and unanswered by the government.

Defendant filed an additional brief in support of this ground on his motion on April 25, 1975. That brief reiterates the substance and, for the most part, is a copy of an earlier memorandum filed July 19, 1974.

Counsel for the defendant, in their letter to the Court dated June 23, 1975, directs our attention to the government's failure to file any separate suggestions in opposition to either of the defendant's briefs and suggests that such failure "may be viewed by the Court as a concession by the government of the defendant's position." The government's failure to file a separate brief should not, under the circumstances of this case, be viewed as any concession of the validity of the defendant's argument. Other briefs filed by the government in opposition to the numerous motions and briefs filed by the defendant have served to give the Court the benefit of government's view in regard to the question presented.

Defendant's argument is based primarily upon principles applied in *United States v. Denmon* (8th Cir. 1973), 483 F. 2d 1093, and cases decided by this Court, such as *United States v. Howe* (W.D. Mo. 1973), 353 F. Supp. 419. While Count I of the pending indictment clearly is not a model to follow in future

cases, we find and conclude that all necessary elements of the offense are sufficiently alleged to apprise the defendant of what he must be prepared to meet and that the looseness of the government's choice of language does not offend the principles applied in the cited cases. Accordingly, we find and conclude that the ground alleged in paragraph 2 of defendant's April 8, 1975 motion to dismiss is without merit.

V

Paragraph 3 of the defendant's April 8, 1975 motion alleges that:

> Count I fails to state an offense against the United States because of the purported offense is only a misdemeanor and Count I attempts to allege a felony, as set forth in Memorandum and Reply Memorandum in Support of Defendant's Motion to Dismiss Count I of the Indictment filed herein on July 1, 1974 and August 19, 1974.

Both sides have filed lengthy briefs in regard to whether a violation of Section 610 by an officer and director of a national bank should be considered a misdemeanor or a felony. Both sides, in our judgment, have uselessly expended a great deal of time and effort briefing that question. An election by the government to commence a criminal prosecution of a misdemeanor by indictment rather than by information does not subject such an indictment to a motion to dismiss.

Rule 7(a) of the Rules of Criminal Procedure expressly provides (1) that a capital offense shall be prosecuted by indictment; (2) that a felony shall be prosecuted by indictment unless indictment is waived; but (3) that "[a]ny other offense *may* be prosecuted by indictment *or* by information". [Emphasis ours]

The text and the cases cited in Section 121 of Wright, *Federal Practice and Procedure* make clear that an indictment may be

used to commence prosecution of a misdemeanor although prosecution may also have been commenced by an information. Paragraph 7.02 of Moore's *Federal Practice* cites additional cases to support the statement that "[w]hile the Constitution does not require indictment in cases of misdemeanor, there is nothing to prevent the prosecution from presenting a misdemeanor to the grand jury." The question of whether Section 510 provides for a misdemeanor or a felony may not properly be decided on a motion to dismiss. Indeed, it is entirely conceivable, even if it be assumed that the defendant should be found guilty as charged in Count I, that this Court would not have to determine the question which the parties have so fully briefed. Certainly the determination of such a question at the present time is premature. We therefore find and conclude that the ground alleged in paragraph 3 of defendant's April 8, 1975 motion to dismiss is without merit.

VI

Paragraph 4 of defendant's April 8, 1975 motion alleges that:

> The statute upon which Count I is based, 18 U.S.C. § 610, is unconstitutional as written and as applied to Defendant, as set forth in Defendant's Motion to Dismiss Indictment and Each Count Thereof and Memorandum and Reply Memorandum in Support of Defendant's Motion to Dismiss Count I of the Indictment on the Ground of the Unconstitutionality of 18 U.S.C. § 610 filed on June 7, 1974 and June 21, 1974.

Defendant does not cite any cases to support his contention that Section 610 is unconstitutional as written and as applied to the Defendant in this case. Defendant's arguments are based upon language in cases construing statutes other than Section 610.

Section 610 has been subjected to constitutional attack in some of the relatively few prosecutions commenced under that statute. The Supreme Court, however, did not reach any constitutional question in either *United States v. Pipefitters*, 407 U.S. 335 (1972) or in *Cort v. Ash*, No. 73-1308, — U.S. —, decided June 17, 1975, but not yet reported [43 L.W. 4773]. Judge Heaney of our Court of Appeals has expressed his view on the constitutionality of Section 610 but that view was expressed in a dissenting opinion in the Court of Appeals decision in *Pipefitters*, 434 F. 2d 1127, 1132 (8th Cir. en banc 1970).

While we recognize the force of some of the arguments made by the defendant, we feel bound by presently controlling decisions and therefore conclude that the ground stated in paragraph 4 of defendant's April 8, 1975 motion to dismiss is without merit.

VII

On April 25, 1975 defendant filed a motion to dismiss Count I based on the alleged ground that because the government elected to proceed to trial on Count II, the government is now barred from proceeding against defendant on Count I. Defendant's recently filed suggestions in support of that ground concede that the "inconsistency issue" presented was extensively briefed in connection with other grounds upon which defendant relies. The same thing is true in regard to the double jeopardy arguments made in support of the ground alleged in defendant's recent motion.

What we have said above in connection with both of those questions supports our finding and conclusion that defendant's motion filed April 25, 1975 based on the "election ground" is without merit.

VIII

Defendant's final ground in support of his motion to dismiss Count I is based on the statute of limitations. Defendant's memorandum in support of that ground, filed April 25, 1975, reflects that it is based upon the contention that because, in accordance with defendant's view, the alleged offense is only a misdemeanor, § 3288, Title 18, United States Code, could not effectively extend the statute of limitations because that statute extends the statute of limitations only in regard to felony prosecutions. Section 3288 is broad enough to extend the time for filing any new indictment, regardless of whether the offense charged may be a misdemeanor or a felony. We have concluded above that a misdemeanor prosecution may properly be commenced by indictment. Defendant's contention to the contrary is without merit.

Defendant's second statute of limitations argument is based upon its contention that the liability of the individual defendant under Section 610 is "derivative" and that because the manner in which the government lost its prosecution of the Bank requires the dismissal of what we have held to be a separate offense against the individual defendant. We have fully stated our finding and conclusion that the liability of the defendant is not derivative. It follows that we find and conclude that both grounds upon which defendant's statute of limitations motion is based are without merit.

IX

For the reasons stated, we find and conclude that none of the grounds alleged in support of defendant's various motions to dismiss are tenable. An order therefore will be entered denying all pending motions to dismiss. We shall also enter orders directing further proceedings in connection with the trial of Count I. It is therefore

Ordered (1) that all of defendant's pending motions to dismiss Count I should be and the same are hereby denied. It is further

Ordered (2) that counsel shall meet with the Court for the purpose of determining a convenient time for the trial of Count I. Counsel shall be prepared to state at the conference how much, if any, of the evidence adduced at trial of Count II may be considered by the Court in connection with the trial of Count I. It is further

Ordered (3) that such conference shall be convened on the earliest convenient date, after counsel for both parties have advised the Court.

JOHN W. OLIVER
District Judge

Kansas City, Missouri
July 15, 1975

APPENDIX B

OPINION

United States Court of Appeals
For the Eighth Circuit

Nos. 75-1568 and 75-1569

No. 75-1568

United States of America, Appellee, v. Alexander J. Barket, Appellant.		Appeal from the United States District Court for the Western District of Missouri.

No. 75-1569

Alexander J. Barket, Petitioner, v. The Honorable John W. Oliver, United States District Judge, and United States of America, Respondents.		Petition for Writ of Mandamus.

Submitted: November 14, 1975

Filed: December 9, 1975

Before Matthes, Senior Circuit Judge, Lay and Stephenson, Circuit Judges.

MATTHES, SENIOR CIRCUIT JUDGE.

Alexander J. Barket has appealed from the order of the district court* denying his motion to dismiss Count I of a two-count indictment (our Appeal No. 75-1568). Alternatively, Barket filed a petition for writ of mandamus in this court (No. 75-1569) to compel the district court to dismiss Count I and discharge appellant. The appeal and petition for mandamus have been consolidated for briefing, argument and opinion.

Count I of the indictment charged that appellant, an officer of Civic Plaza National Bank, Kansas City, Missouri, consented to the expenditure of the bank's moneys in connection with the 1968 presidential election, in violation of 18 U.S.C. § 610.[1]

Before proceeding to an examination of the merits of the issues presented, a resume of the history of this case in the district court will serve to explain why this litigation is before us.

---

* The Honorable John W. Oliver.

[1] In pertinent part § 610 provides:

> It is unlawful for any national bank, * * * to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, * * *
>
> [A]nd every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The two-count indictment was filed on May 9, 1974.[2] Count I charged that appellant violated 18 U.S.C. § 610 by consenting to the contribution of $7,500 of Civic Plaza's money in connection with the 1968 election for presidential and vice presidential electors. Count II charged that, in violation of 18 U.S.C. § 656, appellant knowingly and without authorization misapplied $9,144 of the bank's funds by paying the money to Rudolph Zatezalo, for the purpose of making an unlawful political contribution.[3]

Both counts were based on the same transactions: an alleged payment of $9,144 from the bank to Zatezalo, as a bonus salary, and a contribution by Zatezalo of $7,500 to the presidential campaign of then Vice President Hubert Humphrey.[4] The government's theory is that appellant approved this payment to Zatezalo, without proper authorization, and so violated both § 656, by misapplying the bank's funds, and § 610 by consenting to an expenditure of bank funds for a presidential election.

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[2] The original indictment in this action was filed on October 11, 1973. The first two counts charged appellant and the bank with the violations alleged here. The third count charged appellant with violating 18 U.S.C. § 1005. This indictment was dismissed on appellant's motion on November 23, 1973. The present indictment was subsequently filed, naming appellant alone as defendant.

A separate information against the bank was also filed, but was dismissed by the trial court.

[3] In pertinent part § 656 provides:

> Whoever, being an officer, director, * * * or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *.

[4] The difference between the amount purportedly paid to Zatezalo ($9,144) and the amount of the alleged contribution ($7,500) apparently represented Zatezalo's increased income tax liability resulting from his receipt of the "bonus."

At a conference on January 28, 1975, the court ordered that the two counts be tried separately. It is unclear at whose instance this order was made.[5]

In any event, after waiver of a jury trial, the case proceeded on Count II alone, the § 656 misapplication charge. At the close of the evidence, the trial judge granted appellant's motion for judgment of acquittal. In granting the motion, he discussed at length the strength of the government's evidence.

Particularly, he said:

> The greatest difficulty, it seems to me, is proof and evidence to support any sort of finding that whatever the defendant may have done, he did for the purpose as alleged by the government "to injure and defraud his bank" * * *.
>
> It is my judgment, and I find, that there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an "illegal" political contribution.

The court then entered a "not guilty" verdict.

Count I of the indictment, the § 610 charge, remained pending. Thereafter, appellant moved to dismiss this count on several grounds. He asserted first that to try him on Count I would violate the fifth amendment's proscription of double jeopardy, because the offense charged in Count I is identical to the offense charged in Count II. In his motion to dismiss appellant relied in part at least on *Ashe v. Swenson*, 397 U.S. 436 (1970) to support this double jeopardy claim.[6] He asserted also that

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[5] The court's memorandum of this conference reads: "The government elected to try the § 656 counts in the two cases." The government asserts that the court compelled it to sever the counts for trial, on motion of appellant.

[6] On appeal, appellant has receded from any claim that *Ashe v. Swenson* involves pure double jeopardy. He recognizes that *Ashe* dealt with collateral estoppel, and incorporated that doctrine into the double jeopardy clause of the fifth amendment.

Count I fails to state an offense, and that § 610 is unconstitutional.

The court denied appellant's motion to dismiss Count I and this appeal followed. In denying the motion, the judge filed a written memorandum and order in which he stated *inter alia*:

> In connection with the Section 656 charge contained in Count II of the indictment, the government was obligated to establish beyond reasonable doubt that the defendant, with intent to injure and defraud the bank of which he was an officer and director, willfully and knowingly misapplied $9,144.00 for the purpose of making an unlawful political contribution. The Section 610 charge alleged in Count I does not require proof of any factual data essential to a Section 656 conviction under Count II. The charge in Count I requires that the government prove beyond reasonable doubt that the defendant "consented" to a $7,500 contribution made by the bank in violation of Section 610. That is an entirely different charge than Count II which alleged that the defendant had made an unidentified unlawful political contribution with money which he had converted from funds formerly owned by the bank.

I

Initially, we consider the question whether the order complained of is a "final decision" appealable under 28 U.S.C. § 1291.

The parties disagree on this vital question. The appellant relies on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and cases cited below from four courts of appeals in support of his contention that even though the order denying the motion to dismiss is collateral in nature, it should be treated as final and appealable. The government argues that the order does not fall within the ambit of the *Cohen* doctrine and submits

that the four cases relied upon by the appellant are distinguishable. The government argues also that the double jeopardy and collateral estoppel issues can be determined after another trial and entry of a final judgment under 28 U.S.C. § 1291.

Ordinarily, absent compelling reasons, an interlocutory order, such as an order denying a motion to dismiss an indictment, is non-appealable. *Cohen v. Beneficial Industrial Loan Corp., Supra*; *Snodgrass v. United States*, 326 F.2d 409 (8th Cir. 1964). However, where, as here, the appellant in good faith contends that another trial is barred by former jeopardy, this general rule does not apply. Rather, denial of the motion to dismiss is deemed appealable as a collateral order, within the doctrine of *Cohen v. Beneficial Industrial Loan Corp., supra. United States v. DeSilvio*, 520 F.2d 247 (3d Cir. 1975); *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975); *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972); *see also Thomas v. Beasley*, 491 F.2d 507 (6th Cir. 1974); *contra, United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975).[7]

The denial of the motion to dismiss in this case has all the characteristics of a collateral order. These characteristics are enumerated by Professor Moore:

> (1) [T]he order must be a final determination of a claim of right "separable from, and collateral to," rights asserted in the action;
>
> (2) it must be "too important to be denied review," in the sense that it presents a "serious and unsettled question" and

---

[7] We agree with the government that the factual contexts of the cases relied upon by appellant are dissimilar from the circumstances here. But central to all of the cases was a double jeopardy plea and, more importantly, whether that issue could be tested and determined on an appeal from an interlocutory judgment such as an appeal from a denial of a motion to dismiss.

(3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the * * * order and rights conferred * * * will have been lost, probably irreparably."

9 J. Moore, Federal Practice ¶ 110.10, *quoted in Roach v. Churchman*, 457 F.2d 1101 (8th Cir. 1972).

The order denying the motion to dismiss here is the trial court's final determination of appellant's double jeopardy claim. It is separable from the merits of the case. *See United States v. Lansdown, supra*, 460 F.2d at 171. As a question of constitutional right, it is too important to be denied review. *Id.*

Most importantly, review of the double jeopardy claim cannot await final judgment. The double jeopardy prohibition is meant to spare a once-jeopardized defendant not only a subsequent conviction, but also a subsequent trial. It is designed to prevent the government from "subjecting [a defendant] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957); *Accord United States v. Lansdown, supra*, 460 F.2d at 171; *United States v. Brown*, 481 F.2d 1035, 1041 (8th Cir. 1973); *see also Ashe v. Swenson*, 377 U.S. 436 (1970).

If this appeal is not heard now, appellant will lose his claimed right to be free from a second trial.[8] Review thus cannot await final judgment. We hold that the order is appealable, and in so holding, we emphasize that our conclusion is limited to double jeopardy cases.

---

[8] It makes no difference for appealability purposes, of course, whether appellant wins or loses on the merits. *See, e.g., United States v. DeSilvio, supra* (finding that order similar to the one here is appealable, and holding for appellee on merits).

Also, the other grounds for dismissal of the indictment advanced by appellant (failure to charge an offense and the unconstitutionality of § 610) can be heard, if necessary, on appeal from final judgment in the event there is another trial and conviction. Accordingly, we do not consider them now. We limit our consideration to appellant's double jeopardy and collateral estoppel claims.

And because we find the order appealable, we need not consider whether mandamus is appropriate.

II

Appellant in fact makes two separate double jeopardy arguments. First, he contends that the § 610 violation charged in Count I and the § 656 violation charged in Count II are the "same offense," so that his acquittal for the latter bars prosecution for the former. Secondly, he argues that the second prosecution is barred by the "collateral estoppel" rule of *Ashe v. Swenson*, 397 U.S. 436 (1970). We consider each argument in turn.

Two statutes charge the same offense, for double jeopardy purposes, if the violation of each statute is proved by the same evidence. *Blockburger v. United States*, 284 U.S. 299 (1932); *Kistner v. United States*, 332 F.2d 978, 980 (8th Cir. 1964).

Conviction of a bank officer under 18 U.S.C. § 656 requires proof that the officer wilfully misapplied funds for the benefit of himself or another person, for the purpose of defrauding or injuring the bank. This purpose to defraud or injure the bank is an important element of a § 656 offense. *See United States v. Giordano*, 489 F.2d 327, 330 (2d Cir. 1973).

Conviction under § 610, in contrast, requires proof that the defendant consented to the contribution or expenditure of the bank's funds in connection with an election. No purpose to defraud or injure the bank is required.

There is a fundamental difference in purpose between the two statutes. The misapplication statute, § 656, is meant to protect the funds of banks with a federal relationship. "[C]ourts have generally held that the gist of the offense of willful misapplication is the conversion of funds of a federally insured bank by one connected in some capacity with the bank either to his own use or to the use of a third person, with the intent to injure or defraud the bank." *United States v. Wilson*, 500 F.2d 715, 720 (5th Cir. 1974). The political contribution statute, § 610, in contrast, has for one of its purposes the protection of the electoral process from the influence of corporate and union funds. *See United States v. Auto Workers*, 352 U.S. 567 (1952).

Because of these different purposes, the two offenses contain different elements. As noted, § 656 requires a purpose to injure or defraud the bank; § 610 requires consent to a political contribution. Violations of the two statutes must be proved by different evidence. Therefore, the two counts here charge different offenses.[9] *See United States v. Blockburger, supra.*

Appellant in reality is arguing not that the offenses are identical, but that the § 610 violation is a lesser included offense of the § 656 violation.

One offense is a lesser included offense of another only if, in order to commit the greater offense, it is necessary to commit the lesser. *See United States v. Eisenberg*, 469 F.2d 156, 162 (8th Cir. 1972), *cert. denied*, 410 U.S. 992 (1973). Manifestly, there are many ways to misapply funds, in violation of § 656, without consenting to a political contribution in violation of § 610. It is thus possible to commit the greater offense

[9] Appellant makes much of the government's assertion that it will introduce at trial on Count I the same evidence used at the trial of Count II. The question before us is not, however, what evidence is to be used at trial. Rather, the question is what evidence is required to convict under the two statutes.

without committing the lesser, and the lesser included offense doctrine is inapplicable.

The two counts, then, do not charge the same offense. Nor is the offense charged in Count I a lesser included offense of the offense charged in Count II. This aspect of the double jeopardy prohibition is thus inapplicable, and appellant's point is without merit.

III

Appellant's second argument is based, not on pure double jeopardy, but on the "collateral estoppel" principle of *Ashe v. Swenson*, 397 U.S. 436 (1970). The Supreme Court there held that, where an issue of ultimate fact has been determined by a final judgment in a criminal case, to relitigate the issue in a subsequent trial for a different offense violates the double jeopardy prohibition. Appellant contends that the trial judge, in commenting on the weight of the government's evidence, decided certain factual issues in appellant's favor which would be crucial to a prosecution on Count I.

The statements referred to were made from the bench at the close of the evidence at the trial on Count II.[10] They lack the clarity which could be found in written findings of fact. It is therefore difficult to determine what factual issues the trial judge intended to resolve by the statements.

As shown above, in ruling on the motion to dismiss which is now before us, the trial judge found that his disposition of Count II had not foreclosed any issues essential to the trial of Count I. We are not bound by this finding. Rather, we must

[10] Appellant did not request formal findings of fact, and none were made. *See* Fed. R. Crim. P. 23(c). The "findings" referred to here were oral comments made in the disposition of the motion for judgment of acquittal. Because none forecloses an issue essential to Count I, it is not necessary to consider whether "findings" of this kind can bring the *Ashe v. Swenson* rule into play.

make our own examination of the record, to see what factual issues were resolved in connection with the motion for judgment of acquittal, and which of these issues, if any, would be material to a § 610 prosecution. We note first that the one issue on which the trial court unquestionably found a failure of proof is not essential to a § 610 proceeding. The court ruled that the government had failed to prove that appellant acted for the purpose of injuring and defrauding his bank. As observed, this is not an element of the § 610 offense, so that this finding does not preclude conviction under that statute.

Appellant relies on certain other "findings" of the trial court to support his *Ashe v. Swenson* claim. He points, first, to the trial court's assertion that the evidence did not support a finding that appellant acted "wilfully." It is not at all clear what the trial judge meant by his use of the word "wilful." He might have meant to say that appellant did not act for the specific purpose of violating § 656, or to assert again that appellant did not act to injure the bank. If so, this "finding" of lack of wilfulness is irrelevant to the § 610 charge.

Similarly, the court found that "there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an 'illegal' political contribution." This comment was made in the midst of a discussion of the requirement that a § 656 misapplication necessarily involve a conversion. The court emphasized the word "illegal." It might well have meant to say, not that the government failed to prove the political contribution, but that it failed to prove that the contribution resulted from an unauthorized, i.e., "illegal," conversion of bank funds. Conviction under § 610 does not require that the contribution of bank funds be unauthorized. If the sentence quoted is given this meaning, prosecution under § 610 remains possible.

Appellant asserts, finally, that the court found that the government failed to prove that appellant was "tied" to the contribution

in question. The record shows that the court did not in fact so find. Although it indicated that there was "some difficulty" in tying the alleged contribution to appellant in light of certain documentary evidence, it did not expressly rule on the question. In the absence of a clearer declaration by the trial judge, we cannot say that the issue of appellant's participation in the contribution was resolved.

In any *Ashe v. Swenson* case, the burden is on the defendant to show that the verdict or the findings of the court in the prior case necessarily foreclosed an issue essential to the subsequent prosecution. *See United States v. Gagliardo*, 501 F.2d 68, 70 (2d Cir. 1974). Appellant has not sustained this burden here. None of the statements referred to by appellant unambiguously forecloses issues essential to Count I.

Appellant has thus not shown that the prosecution of Count I is barred by the trial court's disposition of Count II, either under traditional double jeopardy standards or under the rule of *Ashe v. Swenson*. The trial court therefore did not err in denying the motion to dismiss.

The government has indicated that it will present at the trial of Count I the same evidence it produced at the trial of Count II. We assume that the trial court will provide both parties the opportunity to present additional evidence if they choose to do so.

The petition for writ of mandamus is denied. The order of the district court denying appellant's motion to dismiss is affirmed.

STEPHENSON, CIRCUIT JUDGE, CONCURRING AND DISSENTING.

Assuming arguendo that the order of the district court denying appellant's motion to dismiss Count I is an appealable order I concur with parts II and III of the majority opinion.

However, I respectfully dissent from part I of the majority opinion because it is my view that the order denying dismissal of Count I is not a final decision appealable under 28 U.S.C. § 1291. I am in accord with the views expressed in *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975). *Cf. United States v. Nixon*, 418 U.S. 683, 690-92 (1974).

I would deny the petition for writ of mandamus for the reason that exceptional circumstances justifying invocation of this extraordinary remedy do not exist. *Will v. United States*, 389 U.S. 90, 95 (1967).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

OPINION

United States Court of Appeals
For the Eighth Circuit

September Term, 1975

75-1568
United States of America,
Appellee,

vs.

Alexander J. Barket,
Appellant.

75-1569
Alexander J. Barket,
Petitioner,

vs.

The Honorable John Oliver, etc., et al.,
Respondents.

Appeal from the United States District Court for the Western District of Missouri

Petition for Writ of Mandamus

The Court having considered petition for rehearing en banc filed by counsel for appellant-petitioner Alexander J. Barket and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 9, 1976

APPENDIX D

TITLE 18 U.S.C. § 610

Contributions or Expenditures by National Banks, Corporations or Labor Organizations:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both. . . .

TITLE 18 U.S.C. § 656

Theft, Embezzlement, or Misapplication by Bank Officer or Employee:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

Supreme Court, U. S.
FILED
MAY 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1280

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALEXANDER J. BARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

SHIRLEY BACCUS-LOBEL,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1280

ALEXANDER J. BARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-14 to A-26) is reported at 530 F.2d 181. The opinion of the district court (Pet. App. A-1 to A-13) is unreported. Prior opinions of the district court are reported at 380 F. Supp. 1018, 65 F.R.D. 410, and 64 F.R.D. 573.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1975. A petition for rehearing *en*

banc was treated by the court as a petition for rehearing and denied on February 9, 1976 (Pet. App. A-27). The petition for a writ of certiorari was filed on March 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pretrial order declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

2. Whether petitioner, who was acquitted on one count of a two-count indictment charging related offenses, can be tried on the remaining count consistently with the principles of double jeopardy and collateral estoppel.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *.

STATEMENT

Petitioner is the president of a national bank. He was charged in a two-count indictment with offenses

growing out of an alleged contribution of bank money in 1968 to a candidate for President. Count I charged petitioner with consenting to the contribution of $7,500 of the bank's money, in violation of 18 U.S.C. 610. Count II charged him with willfully misapplying $9,144 of the bank's money, in violation of 18 U.S.C. 656. The money was "misapplied," the indictment alleged, because it ostensibly had been given as a "bonus" to a bank official but actually was paid by the official as a political contribution.[1] The two counts were severed for trial.[2] The government elected to try Count II first. After a nonjury trial the court acquitted petitioner.

Petitioner then moved to dismiss Count I. He argued that trial on Count I would be barred by the Double Jeopardy Clause and principles of collateral estoppel. The district court denied the motion. Petitioner immediately filed an appeal.[3] The court of appeals, with Judge Stephenson dissenting, held (Pet. App. A-18 to A-21) that the denial of the double

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[1] The difference between the $7,500 specified in Count I and the $9,144 specified in Count II was allegedly retained by the bank official to recompense him for his income tax liability on the "bonus" he purportedly received.

[2] The record does not reflect at whose instance this order was made. The Assistant United States Attorney who attended the pretrial conference informs us that the court ordered the severance on the oral motion of petitioner's counsel.

[3] Petitioner also filed a petition for a writ of mandamus, which the court of appeals denied (Pet. App. A-21, A-25) in light of its holding on appealability.

jeopardy claim was immediately appealable under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. It therefore entertained his appeal on that ground, but it dismissed the appeal insofar as petitioner argued that the indictment fails to charge an offense and that 18 U.S.C. 610 is unconstitutional. The court then unanimously rejected the double jeopardy claim on the merits (Pet. App. A-21 to A-25).

ARGUMENT

1. a. The court of appeals held that it had jurisdiction to entertain petitioner's double jeopardy claim. We believe that this jurisdictional decision requires review by this Court, which may notice lack of a lower court's jurisdiction *sua sponte*. *Liberty Mutual Insurance Co.* v. *Wetzel*, No. 74-1245, decided March 23, 1976; *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379. We believe that the importance of the issue makes it appropriate to grant the petition in order to resolve a jurisdictional problem of substantial practical importance, as it did in *DiBella* v. *United States*, 369 U.S. 121.[4]

[4] In *DiBella* the court of appeals had held that an order denying a pretrial motion to suppress evidence was appealable, but the court rejected DiBella's claim on the merits. *DiBella* v. *United States*, 284 F.2d 897 (C.A. 2). DiBella petitioned for a writ of certiorari to review the merits of the suppression claim. The Court granted the petition (over the Solicitor General's opposition, which noted the jurisdictional problem), and vacated the judgment, instructing the court of appeals to dismiss for want of jurisdiction.

b. The question whether the pretrial denial of a double jeopardy claim is an appealable "final" order within the meaning of 28 U.S.C. 1291 is one of increasing importance. Four courts of appeals now allow immediate appeals from such pretrial orders. In addition to the decision below, see *United States* v. *Lansdown*, 460 F.2d 164, 170-172 (C.A. 4); *United States* v. *Beckerman*, 516 F.2d 905, 906-907 (C.A. 2);[5] *United States* v. *DiSilvio*, 520 F.2d 247, 248, n. 2a (C.A. 3), certiorari denied, December 8, 1975 (No. 75-352); *United States* v. *Starks*, C.A. 3, Nos. 75-2071, 75-2072, and 75-2073, decided February 10, 1976, petition for a writ of certiorari pending *sub nom. Abney* v. *United States*, No. 75-6521.[6] Cf. *Thomas* v. *Beasley*, 491 F.2d 507 (C.A. 6) (grant of a pretrial writ of *habeas corpus* on double jeopardy grounds). The Fourth Circuit, moreover, has extended its rule to allow immediate appeals from pretrial orders denying speedy trial claims. *United States* v. *MacDonald*, Nos. 75-1870 and 75-1871, decided January 23, 1976, rehearing *en banc* denied April 30, 1976;[7] *United States* v. *Piluso*, No. 76-

[5] See also *Caputo* v. *United States*, C.A. 2, No. 75-1412, decided March 15, 1976.

[6] The issue is presently before the Ninth Circuit as well. *Young* v. *United States*, No. 75-3102.

[7] Chief Judge Haynsworth and Judges Craven and Widener dissented from the denial of *en banc* consideration.

1274, motion to dismiss the appeal denied March 31, 1976.[8]

The Fifth Circuit, however, has explicitly held that pretrial orders rejecting double jeopardy claims are not immediately appealable. *United States* v. *Bailey*, 512 F.2d 833, 836-838. The court of appeals in this case recognized the conflict (Pet. App. A-19), and Judge Stephenson, dissenting in part, would have followed *Bailey* (Pet. App. A-26).

c. The settled principle, embodied in 28 U.S.C. 1291, is that an appeal ordinarily must await final judgment in the district court. "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella* v. *United States*, *supra*, 369 U.S. at 124. "The purpose of the statute [governing appeals] is to give review in one proceeding after final judgment of matters in controversy in any given case." *Heike* v. *United States*, 217 U.S. 423, 430.

This principle is no mere rule of convenience. It is necessary to ensure the effective administration of the criminal justice system. "This insistence on finality and prohibition of piecemeal review," the Court explained in *DiBella*, "discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases" (369 U.S. at 124). In light of the central role of this principle in criminal cases, this Court has permitted pretrial appeal only when a statute explicitly so provides.[9]

[8] *Piluso* became moot when the district court dismissed the indictment on another ground.

This Court long ago indicated that the pretrial denial of a double jeopardy claim is an unappealable interlocutory order. *Rankin* v. *The State*, 11 Wall. 380, held that a reversal by a state supreme court of a pretrial dismissal of a state indictment on double jeopardy grounds was not a "final judgment or decree" that could be appealed to this Court. Review could be had, it wrote, only after a final judgment of

[9] This case demonstrates how much delay can be created by permitting interlocutory appeals of this nature, and why such delay "is fatal to the vindication of the criminal law" (*Cobbledick* v. *United States*, 309 U.S. 323, 325). Petitioner's claims were rejected by the district court on July 15, 1975. Although the court of appeals found the claims to be insubstantial, ten months have passed and a trial on the charge still cannot be set until this Court has heard the case or denied certiorari. Similarly, the order denying the motion to dismiss in *Abney*, *supra*, which the court of appeals eventually affirmed without written opinion or oral argument, was entered on September 2, 1975, over eight months ago. In *Young* (see note 6, *supra*) the district court entered its order on August 8, 1975, and an appeal was filed on August 20. Despite the filing of a motion to dismiss the appeal for lack of jurisdiction, the case is still in the court of appeals; it has not yet been argued.

The delay in each of these cases has been caused primarily by the double jeopardy claim. But in *Abney* the defendants also alleged that the indictment failed to charge an offense; the court of appeals considered that claim as well. The potential for delay caused by joining a colorable statutory claim to a frivolous double jeopardy claim is immense.

conviction. *Heike* v. *United States*, *supra*, held that the Court had no jurisdiction to entertain a pretrial appeal from the denial of a comparable plea in bar (there of statutory immunity). The Court analogized a plea of statutory immunity to a plea of former jeopardy; it relied on and reaffirmed *Rankin*, writing (217 U.S. at 432) that "the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment." See also *Eastman* v. *Ohio*, 299 U.S. 505; *Berman* v. *United States*, 302 U.S. 211, 212-213 (judgment not final until sentence is imposed); *Cogen* v. *United States*, 278 U.S. 221 (an order denying a pretrial motion to suppress evidence is not appealable); *Parr* v. *United States*, 351 U.S. 513 (orders dismissing an indictment and setting trial in another district are not appealable).[10]

d. The finality principle sometimes yields to other considerations. When a pretrial order relates to a matter collateral to the cause of action, when the collateral claim can be heard on appeal without delaying the main action, and when the collateral claim would be effectively unreviewable (at great loss to one of the parties) if appeal were delayed, courts may entertain a pretrial appeal. *Cohen* v. *Beneficial*

[10] "True, the petitioner will have to hazard a trial under the Austin indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi indictment, but 'bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick* v. *United States*, *supra*, at p. 325" (351 U.S. at 520).

Industrial Loan Corp., 337 U.S. 541. Assuming that this exception is applicable to criminal cases in the absence of a statute indicating Congress's acceptance of it (a matter not free from doubt),[11] we submit that its conditions are not fulfilled here.

A double jeopardy claim is not entirely "collateral" to the main cause of action. The central issue litigated in a criminal case is "the right to convict the accused of the crime charged in the indictment" (*Heike*, *supra*, 217 U.S. at 429; *Parr* v. *United States*, *supra*, 351 U.S. at 518-519). A double jeopardy claim is simply one reason (albeit a reason founded on the Constitution) why there should be no conviction. It is also on some occasions a reason why there should be no trial at all, but that aspect cannot be severed from the other issues involved. Too, a double jeopardy claim cannot be appealed "without halting the main trial." *Stack* v. *Boyle*, 342 U.S. 1,

[11] Because of the pressing need for expeditious resolution of criminal cases, this Court has held many times that the principles governing civil appeals cannot be transferred wholesale to criminal appeals. It has confined criminal appeals more closely to the literal terms of governing statutes. It has used the "collateral order doctrine" of *Cohen* only once to support jurisdiction in a criminal case. *Stack* v. *Boyle*, 342 U.S. 1 (order relating to the amount of bail). As *Stack* and *Carroll* v. *United States*, 354 U.S. 394, make clear, however, the "collateral order doctrine" in criminal cases applies to very few situations involving issues truly distinct from the central question of the propriety of conviction. *Carroll* itself held that in the absence of statutory authorization the government could not appeal an order suppressing evidence, even though the order likely would be the death knell of the prosecution.

12 (Jackson and Frankfurter, JJ., concurring). Finally, although the district court's improper rejection of a double jeopardy claim would lead to a trial that should not take place, the rights of the accused "will [not thereby] have been lost, probably irreparably" (*Cohen, supra*, 337 U.S. at 546). Protection against repetitious trials is but one goal of the Double Jeopardy Clause. An equally important aspect is the prohibition of punishments after the accused has been either convicted or acquitted for the same offense, a prohibition that can be fully enforced by an appeal in the event of conviction. See *Green* v. *United States*, 355 U.S. 184, 187-188; *North Carolina* v. *Pearce*, 395 U.S. 711, 717; *United States* v. *Wilson*, 420 U.S. 332, 343.[12]

We do not doubt the importance of preventing repetitious trials in contravention of the Clause. This interest in avoiding the trial itself, however, extends only to ordinary claims of prior conviction or acquittal on the same charge. In our view it does not extend to claims of collateral estoppel such as are in part advanced by petitioner, for that principle, although embodied in the Double Jeopardy Clause, is a principle forbidding the prosecution to prove particular factual propositions, not a principle forbidding a

[12] A defendant denied interlocutory access to appellate review is thus not as irretrievably injured as the prosecution, when the latter is similarly denied such access, since ordinarily the prosecution's claims will either be mooted by a conviction or lost without any possibility of review by a verdict of acquittal.

trial.[13] And even when a claim of prior conviction or acquittal on the same charge is presented, an accused's claim always is reviewed by the district court. There is no reason to believe that substantial numbers of valid double jeopardy claims are improperly rejected.[14]

While there may be a sufficiently compelling need to justify affording some access to prompt review when a clearly valid double jeopardy claim is improperly rejected, relief by way of mandamus should suffice to serve that need. The availability of that

[13] But see *Harris* v. *Washington*, 404 U.S. 55, in which the Court entertained a collateral estoppel claim and indicated that it involved "a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged" (404 U.S. at 56; emphasis in original). *Harris* was decided without the benefit of briefs or argument, and, for the reasons indicated in the text, we believe that the quoted language should be deemed open to reexamination.

[14] The costs associated with standing trial are not confined to double jeopardy cases. A violation of the Speedy Trial Clause, an indictment charging a violation of an unconstitutional statute, an indictment that fails to state an offense, an indictment returned by a racially-exclusive grand jury—these situations and more may cause a defendant to undergo a trial in violation of the Constitution. See also note 16, *infra*. Yet it has been settled (at least until recently) that the costs associated with a system of pretrial appeals would far outweigh the costs incurred by the few defendants whose valid constitutional claims are improperly rejected by district courts. The court of appeals recognized part of this principle by declining to entertain petitioner's claim that the indictment charged a violation of an unconstitutional statute (Pet. App. A-21).

writ in appropriate cases would minimize the risk that defendants with truly meritorious claims would improperly be compelled to stand trial, yet it would accomplish this end at a cost that is not prohibitive. Because mandamus would not lie except to correct a clear error, problems of delay that would be caused by the routine pretrial appeal of double jeopardy decisions could be avoided.[15]

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[15] In *Harris* v. *Washington, supra,* the Court held that its jurisdiction was properly invoked when the state courts had denied a pretrial writ of prohibition. It did so without citing or distinguishing the seemingly inconsistent decisions in *Rankin, supra,* and *Heike, supra.* In *Harris* state law had permitted immediate review of the trial court's order rejecting a double jeopardy claim; the further review sought in this Court, therefore, merely extended a disruption which state law countenanced. See *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558, upon which *Harris* relied. See also *Turner* v. *Arkansas,* 407 U.S. 366; *Colombo* v. *New York,* 405 U.S. 9; *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (discussing "finality" of a pretrial decision by a state supreme court). The claim in *Harris* was presented to the state appellate court by a petition for a writ of prohibition, a procedure that might successfully be used in the federal system as well. The availability of prohibition or mandamus would afford the protection of the Double Jeopardy Clause where clearly valid claims are presented. Allowing a defendant to seek mandamus would not unnecessarily delay proceedings in other cases, however. Although the mere filing of a notice of appeal serves to halt proceedings in the trial court that concern the subject matter of the appeal or would affect the appeal (*Newton* v. *Consolidated Gas Co.,* 258 U.S. 165, 177; *Hovey* v. *McDonald,* 109 U.S. 150, 157), only the actual grant of a writ of prohibition or mandamus affects the power of the inferior court. We recognize, however, that our suggestion that mandamus might be available in a criminal case, when appeal is not,

The conclusion reached by the court of appeals allows many cases to be delayed so that a few erroneous decisions can be corrected before trial. Many defendants could frame an insubstantial double jeopardy or collateral estoppel claim if they believed delay helpful to their cause. Moreover, as *MacDonald* (in which the Fourth Circuit allowed pretrial appeal of a speedy trial claim) demonstrates, the rationale of the decision in the instant case could be extended to permit pretrial appeal of many constitutional claims.[16] The benefits of such review, however,

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arguably is inconsistent with *Parr, supra,* and with *Will* v. *United States,* 389 U.S. 90. If certiorari is granted, our brief on the merits will discuss this problem more thoroughly.

[16] Numerous provisions of the Constitution arguably forbid not only a conviction but also the judicial proceedings leading to a conviction. (1) The Speech and Debate Clause (Article I, Sec. 6, cl. 1) provides that a member of Congress "shall not be questioned in any other place" for his official acts. See *McSurely* v. *McClellan,* 521 F.2d 1024 (C.A. D.C.) (rehearing *en banc* pending on merits only) and *Rowley* v. *McMillan,* 502 F.2d 1326 (C.A. 4) (the former holding that in civil cases an immediate appeal lies from a pretrial order rejecting a defense of legislative or official immunity and the latter that mandamus lies). Cf. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491; *Gravel* v. *United States,* 408 U.S. 606. (2) Because the only remedy for denial of a speedy trial is dismissal of the indictment (*Strunk* v. *United States,* 412 U.S. 434), it could be argued that the Sixth Amendment forbids the trial itself. The Fourth Circuit so held in *MacDonald, supra,* although we believe that this holding not only is erroneous under settled principles of appealability but also mistakes the principles underlying the Speedy Trial Clause. See *Barker* v. *Wingo,* 407 U.S. 514. (3) The Grand Jury Clause of the Fifth Amendment provides that no individual shall be "held to answer" for a capital or in-

carry too dear a price. The Court should reaffirm the rule that, in the absence of a statute authorizing pretrial review, the "correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before reconsideration by an appellate tribunal" (*Cobbledick* v. *United States, supra,* 309 U.S. at 325-326).

2. Relying principally on *Ashe* v. *Swenson,* 397 U.S. 436, petitioner argues that principles of collateral estoppel foreclose his trial on Count I of the indictment. This is so, he contends, because the same evidence will be offered to prove Count I as previously was offered and found insufficient to support a conviction under Count II. The court of appeals correctly rejected this claim.[17]

famous crime except upon indictment. Because this protection may be implicated any time an indictment is altered (*Ex parte Bain,* 121 U.S. 1), it could be a fruitful source of pretrial appeals, even when the alteration is perfectly proper. (4) Trials instituted as part of a bad faith campaign to "chill" First Amendment rights also might fall into a prohibited category. See *Dombrowski* v. *Pfister,* 380 U.S. 479. Cf. *Allee* v. *Medrano,* 416 U.S. 802 (federal injunction against state proceedings used to harass people exercising other constitutional rights). Harassment and bad faith are easy to allege and difficult to prove. (5) Trial also might be barred if the prosecution were founded on racially discriminatory reasons (*Yick Wo* v. *Hopkins,* 118 U.S. 356) or were the result of unconstitutionally discriminatory enforcement. Such claims, while seldom meritorious (see *Oyler* v. *Boles,* 368 U.S. 448, 456), are often made. (6) It is not difficult to invent other cases, and this Court's decisions under the civil rights removal statutes (*Johnson* v. *Mississippi,* 421 U.S. 213; *Georgia* v. *Rachel,* 384 U.S. 780; *Greenwood* v. *Peacock,* 384 U.S. 808) discuss circumstances under which a trial itself would be a violation of constitutional rights.

"[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson, supra,* 397 U.S. at 443. In order to ascertain whether an "ultimate fact" has been "determined," it is necessary to inquire whether the prior verdict could have been

[17] Petitioner also contends that trial on Count I is barred directly by his acquittal on Count II because the two counts charge the same offense (Pet. 8). Stating that "it is not necessary to dwell at length on the oft-times thorny issue of double jeopardy" (*ibid.*), he does not elaborate on this contention, except to point out that both counts arise from the same political contribution. The critical inquiry, however, is whether the statutory offenses are the same, not whether the offenses arise from the same events or whether the same evidence is offered to prove them. *Blockburger* v. *United States,* 284 U.S. 299, 304; *Gore* v. *United States,* 357 U.S. 386, 389, 392-393; *Harris* v. *United States,* 359 U.S. 19, 23-24. In this regard, it is clear that 18 U.S.C. 610, which prohibits an officer of a national bank from consenting to a contribution in connection with a public election, creates an offense with elements quite distinct from those of 18 U.S.C. 656, which prohibits the willful misapplication of bank funds with intent to defraud or injure the bank. Since each statute requires proof of a fact not required with respect to the other, prosecution and punishment for violation of both statutes does not violate the Double Jeopardy Clause, even though both offenses arise from the same transaction and even though the same direct evidence may be offered as to both offenses. *Iannelli* v. *United States,* 420 U.S. 770, 785, n. 17; cf. *United States* v. *Gaddis,* No. 74-1141, decided March 3, 1976, slip op. 6 (it is appropriate to indict a defendant on multiple counts arising out of the same bank robbery).

grounded upon "an issue other than that which the defendant seeks to foreclose from consideration" (*id.* at 444). The district court that rendered the verdict of acquittal in the first trial is in the best position to evaluate what it did or did not decide. Here the same judge who acquitted petitioner on Count II rejected his claim that this acquittal resolved critical facts in petitioner's favor (Pet. App. A-4 to A-6).[18]

[18] Petitioner relies upon certain oral statements made by the judge at the time a judgment of acquittal on Count II was entered. He contends that these statements constitute findings which support his collateral estoppel claim. But the same judge who made the statements thought otherwise, and the court of appeals, on whose opinion we rely, agreed (Pet. App. A-23 to A-24; footnote omitted):

> The statements referred to were made from the bench at the close of the evidence at the trial on Count II. They lack the clarity which could be found in written findings of fact. It is therefore difficult to determine what factual issues the trial judge intended to resolve by the statements. .
>
> * * * * *
>
> [Petitioner] points, first, to the trial court's assertion that the evidence did not support a finding that [he] acted "wilfully." It is not at all clear what the trial judge meant by his use of the word "wilful." He might have meant to say that [petitioner] did not act for the specific purpose of violating § 656, or to assert again that [petitioner] did not act to injure the bank. If so, this "finding" of lack of wilfulness is irrelevant to the § 610 charge.
>
> Similarly, the court found "there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an 'illegal' political contribution." This comment was made in the midst of a discussion of the requirement that a § 656 misapplication necessarily involve a conversion. The court emphasized the word "illegal." It might well have meant to say, not that the government failed to prove the political contribution, but that it failed to prove that the contribution resulted from an unauthorized, i.e., "illegal," conversion of bank funds. Conviction under § 610 does not require that the contribution of bank funds be unauthorized. If the sentence quoted is given this meaning, prosecution under § 610 remains possible.

The court accordingly held that petitioner failed to sustain his burden "to show that the verdict or the findings of the court in the prior case necessarily foreclosed an issue essential to the subsequent prosecution" (*id.* at A-25). See *United States* v. *Gugliaro*, 501 F.2d 68, 70 (C.A. 2).

The court of appeals independently analyzed the claim and reached the same conclusion (Pet. App. A-24):

> [T]he one issue on which the trial court unquestionably found a failure of proof is not essential to a § 610 proceeding [Count I]. The court ruled that the government had failed to prove that [petitioner] acted for the purpose of injuring and defrauding his bank. As observed, this is not an element of the § 610 offense, so that this finding does not preclude conviction under that statute.

The prosecution simply failed to prove the essential element of the charge under Count II—willful misapplication of bank funds *with the intent to defraud or injure* the bank. This entirely accounts for the verdict of acquittal on that count. The verdict therefore does not necessarily rest upon the issue which petitioner "seeks to foreclose from consideration" in the trial under Count I, that is, whether he consented to the making of an unlawful campaign contribution.

CONCLUSION

The petition for a writ of certiorari should be granted.[19]

Respectfully submitted.

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[19] Although we believe that the jurisdictional issue presented by this case requires review, it may be that the Court should grant the petition in *Abney* v. *United States*, No. 76-6521, instead of or in addition to the petition in this case. In *Abney*, the court of appeals not only entertained an appeal on a double jeopardy claim but also passed upon appellants' argument that the indictment does not charge an offense. *Abney* therefore presents the additional question whether, if a court of appeals has jurisdiction over the pretrial appeal of the double jeopardy claim, it has jurisdiction over other claims as well. (Petitioner Barket appealed on three claims; the court of appeals dismissed two of them, and petitioner has not sought review of that portion of the court of appeals' judgment.) Although *Abney* therefore might be the better case to review, the court of appeals there wrote no opinion, and we cannot be sure that it intended to set a precedent for review of claims pendant to a double jeopardy claim. This Court also would necessarily be required to rule without the benefit of the views of the court of appeals. We therefore take no position whether it would be preferable to grant certiorari in this case alone, in *Abney* alone, or in both cases.

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Supreme Court, U. S.
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No. 75-1280

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALEXANDER J. BARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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Solicitor General,

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Our memorandum in response to the petition in this case suggested that the Court should grant certiorari in order to resolve a jurisdictional problem of substantial practical importance. We added the caveat (Mem. 18 n.19) that the Court might instead wish to grant only the petition in *Abney* v. *United States*, No. 75-6521, which also presents the issue whether an order declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial. The petition in *Abney* was granted on June 14, 1976, and we submit that by virtue of that action there is no longer any reason either to grant the petition in this case or to hold it pending a decision in *Abney*. The instant petition should be denied so that this case may proceed to trial without further delay.

However this Court may decide the jurisdictional question in *Abney*, petitioner will derive no benefit. The court of appeals entertained petitioner's double jeopardy and collateral estoppel claims on the merits and rejected them. As we have argued in our initial response to the petition (Mem. 14-17), those claims are insubstantial and would not warrant consideration by this Court even if there were jurisdiction to do so. On the other hand, if there is no jurisdiction, petitioner could gain nothing from an order directing the court of appeals to vacate its judgment, for petitioner's trial still would go forward.

We do not believe that petitioner's trial should be further delayed while the Court considers *Abney*. Accordingly, we believe that it now would be appropriate for the Court to consider the petition as if petitioner's double jeopardy claim were the only issue involved, and to grant or deny it on that basis. If, contrary to our submission, the Court should conclude that the double jeopardy claim itself warrants review, this case can be briefed on that issue alone and either decided on the merits or vacated, depending upon the Court's decision in *Abney*. If the Court agrees with us that the claim does not merit further review, the petition should be promptly denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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JULY 1976.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1280

ALEXANDER J. BARKET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO THE MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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ALEXANDER J. BARKET,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO THE MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Although the petition in the instant case was filed almost a month before the petition in *Abney v. United States*, No. 75-6521, the government delayed its response in this case in order to push the weaker *Abney* case to the forefront and relegate the instant matter to deferred status. The government orig-

inally acquiesced in both petitions, asking the Court to rule that the Court of Appeals was without jurisdiction to entertain the double jeopardy question. The government suggested, however, that *Abney* should be granted and *Barket* held, despite the fact that *Barket* was fully briefed below and decided by the Court of Appeals on a plenary opinion. Unlike *Abney*, the instant case presents a clear-cut instance of double jeopardy and prosecutorial overreaching, which would provide a very distinctive backdrop against which to resolve the jurisdictional question common to both cases.

Certiorari was granted in *Abney* on June 14, 1976, and that case is presently in the process of being briefed on the merits. Petitioner Barket has filed a brief *amicus curiae* in *Abney* discussing the jurisdictional question.

In spite of the government's original position that the instant case should be either reviewed or held, the Solicitor General has now filed a supplemental memorandum urging that the petition should be denied "so that this case may proceed to trial without further delay." Having maneuvered *Abney* ahead of this case in order to obviate consideration of the compelling double jeopardy question presented herein, the government now seeks to obscure that important constitutional question by overshadowing it with the jurisdictional issue. For the reasons stated in the petition herein, the double jeopardy question—independent of the jurisdictional issue—demands review by this Court. The retrial which the government now seeks is flatly forbidden by the double jeopardy clause and by this Court's ruling in *Ashe v. Swenson*, 397 U.S. 436 (1970). The facts of this case fit squarely within *Harris v. Washington*, 404 U.S. 55 (1971), and *Turner v. Arkansas*, 407 U.S. 366 (1972).

The government's reply to the merits of the petition is completely lacking in substance and would strip *Ashe v. Swenson* of any meaning whatsoever. Although the prosecutor has twice

conceded that the retrial of petitioner is barred by the double jeopardy clause, the Solicitor General now asks this Court to sanction the prosecutor's judicially-noticed harassment of petitioner and to permit a violation of his constitutional rights. The government's current double jeopardy dilemma is directly attributable to the United States Attorney's penchant for pyramiding charges in order to maximize the pressure on petitioner to "cooperate" in the ongoing and thus-far fruitless investigation of so-called "political corruption" in the previous Democratic state administration. In an earlier case brought against petitioner, the record showed that the U.S. Attorney had obtained multiple-count indictments virtually without evidence merely for the purpose of exerting pressure, had leaked grand jury data to the news media and had used the grand jury process to harass witnesses. The district court dismissed the indictment for prosecutorial misconduct and pre-indictment delay, and that dismissal was upheld by the Eighth Circuit. *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976). The government did not seek review in this Court.

In his thirst for a felony charge, the U.S. Attorney here has parlayed a garden-variety investigation of a single minor campaign contribution into a two-count indictment including a felony charge under 18 U.S.C. § 656. He elected to proceed on that charge and attempted to prove certain facts which are necessarily common to both counts. The incontestable reality, however, is that the trier of fact found a failure of proof on three critical issues which are essential to the charge yet to be tried. The government, simply by changing the name of the crime, now wants another chance to use the very same evidence to prove the very same facts which it has previously been unable to establish.* Judge Henry Friendly had this to say about that:

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* In view of the government's attempt to cloud the meaning of the trial court's findings, we have set forth verbatim in Addendum A, *infra*, the relevant portions of the oral ruling of the district court.

"The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone: The defendant may not later be tried again on the same fact situation, where no significant additional fact need be proved, even though he be charged under a different statute. He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The government should have but one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation, it may not have a succession of trials seriatim." *United States v. Sabella*, 272 F.2d 206, 212 (2d Cir. 1959).

CONCLUSION

Because of the elementary nature of the double jeopardy issue, petitioner respectfully suggests that if certiorari is not to be granted now, the Court should continue to hold this case until resolution of *Abney*. If the jurisdictional question is resolved affirmatively in *Abney*, this case should then be summarily reversed, as were *Harris* and *Turner*. On the other hand, if the Court determines in *Abney* that the Court of Appeals was without jurisdiction, the judgment below could then be summarily vacated in light of *Abney*. Should the Court desire briefs on the merits of this case, it may wish to grant certiorari at the beginning of the Term and then, after consideration of such briefs, take appropriate action either in conjunction with *Abney* or following disposition of *Abney*.

Respectfully submitted,

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ADDENDUM

ADDENDUM A

Excerpts From Oral Opinion of Judge John W. Oliver Acquitting Petitioner of Offense Alleged in Count II of the Indictment

In this case the government alleged that on or about the 15th day of October 1968, the defendant, being an officer and director of the bank, with intent to injure and defraud said national bank, wilfully and knowingly did misapply money and funds of said bank in the amount of $9144, by paying said funds of the said bank to Rudolph E. Zatezalo under the guise of a bonus salary which had not been earned and which had not been authorized by the Board of Directors of the said bank, for the purpose of making an unlawful political contribution, all in violation of Title 18, United States Code, Section 656.

The question of law presented by the defendant's motion for acquittal is whether or not the government has adduced sufficient evidence which the trier of the fact, either a jury or a judge sitting as a trier of the fact, could make a finding which would sustain the government's claim that the bonus, whether earned or not, and whether or not authorized by the Board of Directors, findings which the Court could make and would make in the government's favor, was nevertheless a "wilful" misapplication made, No. 2, with intent to injure and defraud the bank, and (3) made with the purpose of making an unlawful political contribution.

Now, what evidence did the government actually adduce in regard to the crucial allegation of the indictment?

* * * * * * *

But the most important witness in regard to the actual operation was not available in the trial of this case because of

the exercise of his rights as guaranteed by the Constitution of the United States. Perhaps with that testimony, there may have been adduced some sort of evidence upon which to make a finding supported by factual data as distinguished from conjecture and speculation that the defendant acted wilfully.

The greatest difficulty, it seems to me, is proof and evidence to support any sort of finding that whatever the defendant may have done, he did for the purpose as alleged by the government "to injure and defraud his bank."

The evidence in this case establishes to my satisfaction that the deposits of the bank were built on political connections, and that the defendant was attempting to keep friendly with whatever powers may have controlled the selection of friendly banks.

To say that this sort of business was to injure his bank when political connection was dependent on maintaining the bank is a finding which I cannot make in this case.

* * * * * * *

It is my judgment, and I find, that there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an "illegal" political contribution. The insertion of the word "illegal" in the indictment was not before the word "purpose." It was before "political contribution."

The government's theory that under Section 656 that it may establish a case under that statute by ignoring the requirement that there must be a finding of conversion as defined both in the *Britton* case and the *Bevans* case in the Eighth Circuit, and that there must be substantial evidence to show that the defendant's conversion was for either his own benefit or the benefit of another, cannot be salvaged by the government's effort to have this court somehow read into Count II the Section 610 allegations of Count I.

The addition of the word "illegal political contribution" substantially helped the government from suffering dismissal before trial. There are many illegal political contributions that if the full testimony of all knowledgeable persons were elicited, that may have been capable of establishment.

The evidence in my judgment however, does not support really an allegation of "illegal," and there is an apparent gap in the evidence that some of the contributions which carry Mr. Houtchens' signature or notes, namely, Plaintiff's Exhibits 31 and 32—one of those exhibits has no date at all; it does list a $5,000 contribution from Dr. Zatezalo.

Because Dr. Zatezalo was placed in funds by Mr. Patti and Mr. Barket, I would draw the inference that whatever funds on the list of Missouri contributions of Humphrey for President were included in that document.

There is difficulty, however, in tying the $7500 bonus contribution to either Dr. Zatezalo, Barket, Patti or anyone else in light of the fact that Plaintiff's Exhibit 32 carries a date of October 14, 1968, and all of the undisputed evidence in this case establishes that Dr. Zatezalo didn't even write a hot check until that date and it was not in funds to be cleared until some two days later.

Those matters may have been subject to clarification by the testimony of the man who carried the bag, but he wasn't here.

Every case I try before a jury, I state the constitutional standard of proof beyond reasonable doubt, that all defendants charged in a court of the United States are presumed to be innocent, that they are entitled to rely upon any testimony developed on cross-examination, that they are not obligated to adduce any evidence whatever, that the failure of proof as well as the absence of proof is ground for acquittal.

Had this case been before a jury, I would have granted the defendant's motion and directed the entry of a judgment of acquittal. In a non-jury case I make the same grant and to reflect what the action of the Court is and its determination that sufficient evidence has not been adduced to prove the defendant guilty beyond reasonable doubt.

I am writing the words "Not Guilty" in the verdict, signing it, and handing it to the clerk for filing.

* * * * * * *